



August 2008  
Volume 77  
Number 8

United States  
Department of Justice  
Federal Bureau of Investigation  
Washington, DC 20535-0001

Robert S. Mueller III  
Director

Contributors' opinions and statements should not be considered an endorsement by the FBI for any policy, program, or service.

The attorney general has determined that the publication of this periodical is necessary in the transaction of the public business required by law. Use of funds for printing this periodical has been approved by the director of the Office of Management and Budget.

The *FBI Law Enforcement Bulletin* (ISSN-0014-5688) is published monthly by the Federal Bureau of Investigation, 935 Pennsylvania Avenue, N.W., Washington, D.C. 20535-0001. Periodicals postage paid at Washington, D.C., and additional mailing offices. Postmaster: Send address changes to Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Law Enforcement Communication Unit, Hall of Honor, Quantico, VA 22135.

**Editor**

John E. Ott

**Associate Editors**

Cynthia L. Lewis

David W. MacWha

Bunny S. Morris

**Art Director**

Denise Bennett Smith

**Assistant Art Director**

Stephanie L. Lowe

**Staff Assistants**

Cynthia H. McWhirt

Cindy L. Blackstone

This publication is produced by members of the Law Enforcement Communication Unit, Training Division.

Issues are available online at  
<http://www.fbi.gov>.

**E-mail Address**

[leb@fbiacademy.edu](mailto:leb@fbiacademy.edu)

**Cover Photo**

© digitalvision

Send article submissions to Editor,  
*FBI Law Enforcement Bulletin*,  
FBI Academy, Law Enforcement  
Communication Unit, Hall of Honor,  
Quantico, VA 22135.

# FBI Law Enforcement Bulletin

## Features

### Safeguarding Undercover Employees

By Meredith Krause

1

*The selection, management, and retention of effective undercover employees pose significant challenges to law enforcement agencies.*

### Erasing the Past

By Bakir Poljac and  
Tod Burke

13

*Tattoo-removal programs can help former gang members start a new life.*

### Speech and the Public Employee

By Lisa A. Baker

23

*Recent Supreme Court cases clarify First Amendment protection of employees who speak in the performance of official duties, rather than as private citizens.*

## Departments

### 9 Leadership Spotlight

Self-Motivation and  
Self-Improvement

### 19 Focus on Officer Safety

Jesus Malverde

### 10 Police Practice

The Sikeston Department  
of Public Safety

### 22 Crime Data

Law Enforcement Officers  
Killed in 2007

### 18 Unusual Weapon

Eyebrow Razor



# ***Safeguarding Undercover Employees***

## ***A Strategy for Success***

By MEREDITH KRAUSE, Ph.D.

© digitalvision

**T**he selection, management, and retention of effective undercover employees (UCEs) pose significant challenges to local, state, federal, and international law enforcement agencies. UCEs face unique experiences and stressors that set them apart from their overt counterparts and place them at increased risk for psychological injury, disciplinary action, and other adverse personal and professional

consequences. Growing awareness of these hazards among law enforcement managers and allied mental health professionals has resulted in the discussion and development of proactive policies and procedures intended to safeguard the well-being of UCEs.<sup>1</sup>

Some agencies have independent units or divisions dedicated to the recruitment, training, certification, and management of UCEs. In many

other cases, however, managers, supervisors, or affiliated mental health providers must tend to the operational and psychological needs of their UCEs. Regardless of how an agency administers the safeguard process, the commitment of its leaders to the well-being of UCEs from the time of recruitment to their return to regular or overt duties determines the impact and effectiveness of the initiative.<sup>2</sup> Such commitment

and support prove essential to building a safeguard process that UCEs view as a credible, reliable, collaborative, and proactive program worthy of their trust and open and honest involvement.

### **CRITICAL FUNCTIONS OF THE PROCESS**

The undercover safeguard process addresses the needs of UCEs and their agencies throughout the six phases (selection, training, operational planning, deployment, decompression, and reintegration) of covert activity.<sup>3</sup> To accomplish this, the safeguard process exposes the UCE to a complementary team of personnel who shares a commitment to the undercover mission and possesses specialized skills, knowledge, and abilities. At a minimum, this team includes a qualified

mental health professional (for selection and monitoring purposes) and one or more experienced UCEs (to provide input regarding operational or target-specific subjects) who answer to an administrator or supervisor experienced in undercover matters. Given the complex and phased nature of the safeguard process, this team frequently accesses local and federal resources for case- or UCE-specific needs or questions (e.g., tactical, technological, backstopping, or legal) and readily taps into these resources to maximize effectiveness and efficiency. In so doing, the safeguard team can provide critical selection, education, stress inoculation, monitoring, debriefing or reintegration support, and risk management services to UCEs and their department.

### **Selection**

The selection of UCEs is one of the most critical functions of the safeguard team. During this phase, members must apply their knowledge of existing research regarding the personal and professional qualities that distinguish effective UCEs to determine the suitability of a candidate for a given operation. They can maximize the accuracy of such decision making by focusing on the goodness of fit between the candidate and a particular undercover operation (UCO) or activity; by administering psychological tests designed to assess specific traits and skills; and by completing in-depth interviews and role-plays that provide critical information regarding the candidate's personal style, interpersonal skills, professional experience, and operational competence.

During the safeguard interviews, candidates meet independently with the mental health professional (assessor) to review the results of their psychological tests, relate their personal and professional histories, confirm their voluntary status, participate in a brief clinical interview, and discuss relevant personal and interpersonal issues (e.g., coping resources and personal, job, and family stressors). This psychological evaluation is complemented by an independent



*Dr. Krause, a personnel psychologist, serves with the FBI's Undercover Safeguard Unit.*

**“  
The undercover  
safeguard process  
addresses the needs  
of UCEs and their  
agencies throughout  
the six phases...  
of covert activity.  
”**

---

operational assessment conducted by an experienced UCE (counselor) focused on investigative knowledge, trade-craft issues, and problem-solving skills and includes role-play scenarios designed to elicit the candidate's responses to typical undercover experiences. Upon completion of these interviews, the assessor and counselor meet to share their impressions and form a final opinion regarding the suitability of the candidate to the operation. They communicate their findings in writing to the candidate's supervisor or the individual responsible for administering the UCO. The operation-specific nature of this assessment process is critical because it reminds the candidate and other involved parties of the reality that no *one* UCE can function effectively in every UCO. This case- or operation-specific orientation also is important in that it allows initially unsuccessful candidates to return for evaluation as new cases arise in the future.

### Education

The safeguard team also provides an educational function during its interviews with candidates and its ongoing contacts with personnel involved in the administration of UCOs. Specifically, the assessor and counselor provide the candidate with information regarding the qualities and traits that

distinguish effective UCEs, the stressors that they commonly face, the possible pitfalls of undercover work, and the skills and abilities critical to success in undercover roles. In addition, interactions with supervisors and other law enforcement personnel provide the safeguard team with opportunities to educate colleagues regarding risks and benefits of undercover work, effective strategies for

***...the UCE is referred to the safeguard process at the beginning, midpoint, and end of every covert operation.***

managing undercover stress and operations, and other pertinent information. The safeguard team also participates in the training of new or inexperienced undercover employees by providing blocks of classroom-based instruction, creating and participating in role-play scenarios, and functioning as mentors for novice UCEs.

### Inoculation

By speaking with candidates and novice UCEs openly

and frankly regarding the hazards associated with undercover work, the safeguard team promotes the self-awareness and mental preparation needed for them to remain resilient in the face of expected and unexpected stressors. This process challenges the myths promulgated by popular culture portrayals of undercover operatives and inoculates, or protects, UCEs against the adverse impact of undercover stress. This proactive approach attempts to minimize long-term negative changes in personal, professional, health, and family or interpersonal functioning by enhancing their self-awareness, sensitivity to the impact of the work, and willingness to request respite from undercover duties on an as-needed basis.

### Support, Monitoring, and Retention

Upon completion of required training and certification, the UCE is referred to the safeguard process at the beginning, midpoint, and end of every covert operation. In the case of extended UCOs, the UCE participates in the safeguard process at regular intervals determined by the safeguard team (typically every 6 months but more frequently if at increased risk due to the nature of personal stressors or assignment). At each time point, the UCE completes psychological testing



## Critical Functions and Features of the Undercover Safeguard Process

### Critical Functions

- Selection
- Education
- Inoculation
- Support and Monitoring
- Debriefing and Reintegration
- Risk Management

### Critical Features

- Research Based
- Organizationally Embedded
- Mission Oriented
- Case Specific and Time Sensitive
- Separate but Equal Assessment
- Broad Based
- Legally Minded

and interviews with the assessor and counselor. The repeated administration of psychological tests provides objective information regarding changes in stress levels and personality, as well as emotional, health, and interpersonal functioning, over time.

The testing results often identify areas of concern and serve as an important tool for the safeguard team during one-on-one interviews with the UCE, who may be unaware of these changes or unwilling to disclose them. In these cases, the testing results open the door to discussion of sensitive personal issues, which the team can monitor over the course of subsequent safeguard assessments. In many cases, this added monitoring and support feature allows the UCE to remain in the assigned UCO without disruption. In more extreme cases,

however, temporary or permanent removal from the project may be necessary to address problems in personal functioning that jeopardize the health and well-being of the UCE, the UCO, or the department.

### Debriefing and Reintegration

Both research and practice have highlighted the difficulties that UCEs often face upon termination of their UCOs and return to regular duty.<sup>4</sup> Without proper preparation and support prior to and during this period of reintegration, UCEs may manifest adjustment problems that significantly impair their ability to function in expected personal, familial, and professional roles. The safeguard team can ease the reintegration process by discussing the UCE's plan for return to regular duty even *before* the UCO begins and then again during

each safeguard assessment. This approach reinforces undercover assignments as necessarily time limited and the return to regular duty as an expected outcome and not a punishment. Many agencies codify this expectation in policy guidelines that limit the time that any employee can spend undercover and provide for respite periods between undercover assignments.

Even with clear expectations and early preparation for reintegration, UCEs require careful support and monitoring during this phase. Debriefing at the close of the UCO is essential to determine their perspectives on the outcome of the investigation, the perceived level of support for their activity during the investigation, and their feelings about their return to regular duty. Particular attention must be paid to expressions of resentment, mistrust, or divided

---

loyalty (i.e., identification with the target) or to lingering changes in appearance or behavior because these factors may impede successful reintegration.<sup>5</sup> When UCEs manifest these indicators, the safeguard team must work closely with departmental contacts to address and resolve them sensitively and directly. Successful resolution of reintegration-related issues is essential to long-term positive outcomes for both the UCE and the agency and constitutes a prerequisite for return to undercover work.

### **Risk Management and Liability Mitigation**

The safeguard team's exclusive commitment to the health and well-being of the UCE serves a vital risk management and liability mitigation function for the agency. The initial selection process includes both objective and subjective measures of suitability that promote accurate decision making and minimize exposure to litigation related to negligent or unfair hiring or selection procedures. The education and ongoing monitoring and support components of the safeguard process reflect a commitment to prevention of duty-related injuries and early intervention when problems arise with undercover personnel. As such, the safeguard process provides an assertive risk management function that

sensitively balances the needs of the UCE, the operation, and the agency.

### **CRITICAL FEATURES OF THE PROCESS**

To effectively execute the critical functions, the safeguard process must be anchored by an unwavering commitment to the primary well-being of the UCE. In addition, it must adhere to and display seven critical features.

***The education and ongoing monitoring and support components of the safeguard process reflect a commitment to prevention of duty-related injuries....***

### **Research Based**

The safeguard approach is based on more than 25 years of institutional research regarding the experiences, stressors, and outcomes typically associated with undercover assignments.<sup>6</sup> This research has enhanced the selection and monitoring functions performed by safeguard personnel by limiting reliance upon anecdotal information, myth, rules of thumb, and personal opinion or bias. While this

empirical research has formed the foundation of the safeguard process, the changing nature of crime and criminal investigations has forced continued study and programmatic evolution.

For optimal effectiveness, the safeguard team must be well versed in the small but coherent body of empirical research and knowledge regarding undercover stress and the personal and professional characteristics of effective UCEs. In addition, the mental health professional included in the safeguard team must be trained and qualified to administer and interpret appropriate psychological tests that directly measure the characteristics and qualities outlined in this research. Without this knowledge and experience, the safeguard team cannot be expected to accurately select future UCEs, anticipate operational or personal issues among active ones, or intervene appropriately with troubled employees.

### **Organizationally Embedded**

Given the nature of its mission, the safeguard team requires unfettered access to internal and external resources for training UCEs; for establishing and maintaining cover identities; for monitoring the status of the UCO; for resolving administrative issues; and for addressing health, personal, and emotional needs of UCEs. As such, the safeguard team

---

must be empowered to execute its mission and supported by agency personnel at all levels. Close and effective working relationships with agency command staff and federal law enforcement personnel also are essential to the safeguard mission.

### **Mission Oriented**

To establish and maintain credibility among the UCE cadre, the safeguard team must focus on the primacy of the well-being of these employees over the outcome or progress of any given investigation. The team must reflect this primary allegiance to UCEs through the nonadversarial nature of the safeguard assessment process, regular contact with them to build rapport and trust, and written and oral communication with agency command staff regarding their suitability or status. Careful attention to the confidentiality of the information gleaned during safeguard assessments, maintained within a legally protected medical record, must guide all of these contacts. As such, communication regarding a given UCE to agency personnel must provide only essential information, such as the date and outcome of the assessment. In the absence of this type of unwavering commitment, UCEs may view the safeguard team as an adversarial tool of agency management that

intends to strip them of their assignment, wantonly divulge their personal information, or intrude upon their lives.

### **Case Specific and Time Sensitive**

To reduce errors in decision making, the safeguard process necessarily addresses very specific questions regarding the goodness of fit between a *particular* UCE and a *particular* case or assignment at a *particular* point in time.<sup>7</sup> This

“

***Decision making by the safeguard team is based on a host of objective and subjective information from multiple sources.***

”

approach eliminates the need to make global conclusions in the face of insufficient information and, thus, enables the safeguard team to pinpoint the specific assets and liabilities the potential UCE brings to an assignment. This information is shared with the UCE during the safeguard assessment to enhance personal and professional functioning over the course of the UCO and to alert the employee to areas

of risk and possible remediation. Given the case- and time-sensitive nature of this work, it remains imperative that safeguard personnel communicate their decisions to the necessary agency contacts in a timely manner because the UCE's status and suitability always can change.

### **Separate but Equal Assessment Process**

At its core, the safeguard assessment process requires UCEs to undergo independent interviews with a mental health professional and an experienced UCE counselor on the same day. The unique content and structure of these promote broad coverage on a range of personal and operational issues. In addition, this bifurcated design often yields very different disclosures by UCEs based on their relationship and comfort level with the interviewer. This dynamic leads the safeguard team to generate two independent opinions based on different and unique sets of information, which members share and consider in rendering the final determination of suitability for undercover assignment. This approach proves critical in generating a well-rounded understanding of the undercover candidate and in reducing the potential impact of “group think” and other decision-making biases on determinations of suitability.

---

## Broad Based

Decision making by the safeguard team is based on a host of objective and subjective information from multiple sources. This wide-ranging information-gathering method creates a holistic perspective of a given UCE that allows the safeguard team to render accurate decisions and provide tailored support and intervention as the need arises. Critical sources of information include objective personality testing; input from supervisors regarding the UCE's skills, achievements, behavior, and judgment; comments from family members or close contacts; and self-report information from the UCE.

## Legally Minded

During the execution of their duties, team members must remain mindful of the legal issues possibly raised by the information they generate. The most pressing concern relates to the confidentiality of the records produced by the safeguard process. The agency should maintain these as confidential medical records apart from the UCE's personnel file and ensure that supervisory staff or other external parties cannot review them without written permission from the employee. Safeguard personnel may breach this confidentiality, however, should the UCE disclose homicidal or suicidal ideation, child or elder

abuse, or significant criminal involvement. These caveats to confidentiality mirror those in traditional health-care settings and are clearly communicated to the UCE prior to participation in the safeguard process.

Given the content of safeguard records, some concerns have arisen regarding possible disclosure during the course of criminal legal proceedings in an attempt to discredit the testimony of UCEs. Although



case law on this matter has been inconsistent, judges have typically ruled in favor of the protection of the UCE's personal information and service files in all but the most extreme cases of misconduct. Despite this overwhelming pattern, safeguard team members must remain cognizant of the possibility of future disclosure and discovery issues and must structure their documentation in keeping with established best practices related to medical record keeping.<sup>8</sup>

## CONCLUSION

Undercover employees play a vital role in local and federal law enforcement agencies and experience a unique set of demands, stressors, and challenges in the execution of their duties. Case examples and research reports offer chilling evidence of the very real human toll of undercover investigations and emphasize the need for specialized selection, training, and support services suited to the needs of UCEs.<sup>9</sup> The safeguard process represents one integrated approach to addressing the selection, education, inoculation, monitoring, debriefing, and risk management and liability mitigation needs of both UCEs and law enforcement agencies. Effective implementation of an undercover safeguard program depends to a large extent upon organizational commitment to the primary well-being of UCEs and understanding of the well-documented consequences and correlates of undercover work.

Organizational commitment, support, and sensitivity are all necessary conditions for effective implementation of a safeguard program. But, the UCE's willingness to "buy in" to the program determines its ultimate success. Open, honest, and consistent participation in the safeguard process by the UCE cadre can be fostered by adherence to seven critical features that reflect and support the credibility,



trustworthiness, responsiveness, reliability, and effectiveness of the safeguard staff. ♦

#### Endnotes

<sup>1</sup> Australian Institute of Police Management, *Managing the Risk of Psychological Injury Associated with Undercover Policing* (Manly, NSW: Australian Institute of Police Management, 2003); L. Miller, "Undercover Policing: A Psychological and Operational Guide," *Journal of Police and Criminal Psychology* 21 (2006): 1-24; Neil S. Hibler, "The Care and Feeding of Undercover Agents," in *Police Psychology into the 21st Century*, eds. Neil S. Hibler, I. Kurke Martin, and Ellen M. Scrivner (Hillsdale, NJ: Lawrence Erlbaum Associates, Inc., 1995), 299-317; Stephen R. Band and Donald C. Sheehan, "Managing Undercover Stress: The Supervisor's Role," *FBI*

*Law Enforcement Bulletin*, February 1999, 1-6.

<sup>2</sup> I. John Vasquez and Sharon A. Kelly, "Management's Commitment to the Undercover Operative: A Contemporary View," *FBI Law Enforcement Bulletin*, February 1989, 3-12.

<sup>3</sup> Supra note 1 (Hibler).

<sup>4</sup> Supra note 1 (Miller and Hibler).

<sup>5</sup> Supra note 1 (Hibler) and note 2.

<sup>6</sup> For additional information, see U.S. Department of Justice, Federal Bureau of Investigation, *The Special Agent in Undercover Operations: A Research Study* (Quantico, VA, 1980); Michael Arter, "Undercover and Under Stress: The Impact of Undercover Assignments on Police Officers" (Ph.D. diss., Indiana University of Pennsylvania, 2005); and Mark Pogrebin and Eric Poole, "Vice Isn't Nice: A Look at the Effects of Working Undercover," *Journal of Criminal Justice* 21 (1993): 383-394.

<sup>7</sup> David Faust and Jay Ziskin, "The Expert Witness in Psychology and Psychiatry," *Science* 41 (1988): 31-35.

<sup>8</sup> Richard G. Schott, "The Discovery Process and Personnel File Information," *FBI Law Enforcement Bulletin*, November 2003, 25-32.

<sup>9</sup> Supra note 1 (Hibler); Michel Girodo, "Health and Legal Issues in Undercover Narcotics Investigations: Misrepresented Evidence," *Behavioral Sciences and the Law* 3 (1985): 299-308; and Ric Kahn, "Secret Soldier in Drug War Lost Last Battle," *The Boston Globe*, February 27, 1994.

---

*The author gratefully acknowledges the assistance of her fellow members in the Undercover Safeguard Unit and Dr. Stephen R. Band in the preparation of this article.*

---

### The Bulletin's E-mail Address

© Digital Vision



The *FBI Law Enforcement Bulletin* staff invites you to communicate with us via e-mail. Our Internet address is [leb@fbiaacademy.edu](mailto:leb@fbiaacademy.edu).

We would like to know your thoughts on contemporary law enforcement issues. We welcome your comments, questions, and suggestions about the magazine. Please include your name, title, and agency on all e-mail messages.

Also, the *Bulletin* is available for viewing or downloading on a number of computer services, as well as the FBI's home page. The home page address is <http://www.fbi.gov>.

# Leadership Spotlight

## Self-Motivation and Self-Improvement

*Not everything that is faced can be changed, but nothing can be changed until it is faced.*

—James Baldwin

**M**idshipman Second Class Wilson wanted to become a Marine Corps officer since his sophomore year at the U.S. Naval Academy and was yearning for the challenge of Officer Candidate School (OCS). He was looking forward to being motivated by the officers and drill instructors from OCS.

During one of the mentoring sessions held by the platoon's company officer, a few members asked why they never sang cadences while running. The officer's response was simple, direct, and made a point that stuck with Wilson for the rest of his life. The officer said, "Above all else, Marine Corps officers are leaders. As leaders, no one will ever motivate you to keep going in the face of adversity and hardship. Officers have to be able to self-motivate to keep themselves inspired and focused on the mission. Cadences would serve to help motivate you, and you must find your own way."

Following his military service, Wilson began a career in the FBI as a special agent. Shortly thereafter, on Father's Day, he received a leather-bound, blank journal with a photograph of his children on the inside. Not a diary or journal type of guy, Wilson thought, *What am I ever going to do with this?*

A few days later, he became frustrated with a current project that he could not seem to make any progress with. As Wilson sat at his desk, he reached into his briefcase for a pen and came across the journal his children had given him. He took it out and looked at the photograph of his smiling children. He had an immediate

boost of enthusiasm and morale and decided to use the journal as a personal motivator and inspirational tool.

He began inserting into the journal a few photographs of close family and friends, flattering and inspirational e-mails and letters, and any remarkable event that happened either at work or in his private life. His only rule for the journal was that all of the content must be motivational and inspiring. The journal became a repository of positive thoughts and experiences. Adding material and writings in the journal proved extremely self-motivating. Reviewing and reading all of the positive thoughts and affirmations in it became a facilitator for self-motivation.

Leaders often face a multitude of issues and problems that can dampen their motivation. But, by examining their strengths and what makes them truly happy, they can reflect better on their weaknesses through honest self-examination. This can help them work more effectively on their deficient areas and strengthen them as appropriate.

Leadership is not about taking but always about giving. Strong leaders will have a powerful reservoir of motivation and solid tools in place that they can utilize to refill that reservoir without ever taking anything from anyone else. ♦

---

*Special Agent Robin K. Dreeke, an instructor at the Counterintelligence Training Center and an adjunct faculty member of the Leadership Development Institute at the FBI Academy, prepared this Leadership Spotlight.*

---



# Police Practice

## ***The Sikeston Department of Public Safety How One Community Joined Two Forces***

By Drew Juden



**S**ikeston, Missouri, is located in the southeastern part of the state at the top of the “Bootheel” where Interstates 55 and 57 intersect.<sup>1</sup> Encompassing approximately 19 square miles, Sikeston has a population of about 18,000. In 1976, the city council passed an ordinance that established the Sikeston Department of Public Safety, which combined the volunteer fire department with the police agency. At that time, the city hired its first director of public safety to merge the two departments and recruit 11 additional public safety officers.

### **The Divisions**

During the last 30 years, the Sikeston Department of Public Safety has grown and become highly respected. Its 83 staff members, sworn and civilian, are cross trained in both disciplines (police and fire) and may be assigned to either. Each division has its own commander responsible for day-to-day operations. The Police Division, the larger of the two, has a Special Operations

Division (part of the police function but a separate division) that consists of the DARE program (Drug Abuse Resistance Education and Gang Resistance Education and Training), Special Operations Group, school resource officer program, bomb squad, and criminal investigation and narcotics units. The Special Operations Group also receives cross training as hazardous materials technicians. All on-duty police personnel keep fire-bunker gear in their patrol units because most of the equipment has self-contained breathing apparatus. Their primary responsibility is to support the fire division during fire calls. This may include establishing water supply, secondary fire attack, or ventilation, as well as primary fire attack or search and rescue, depending on the proximity to the fire location and arrival of the first-due fire apparatus.

The Fire Division staffs three fire stations that house three pumpers, two rescues, two 75-foot quints,<sup>2</sup> one hazmat unit, a mobile communication unit, and several special support trailers. The most central station has four assigned personnel who

---

respond to all reports of structure fires and operate out of one of the 75-foot quints. The outlying stations usually only have one driver on duty and are assigned by district location. They respond to calls within their primary response area. No medical response is provided with fire apparatus. When necessary, a patrol unit assists the ambulance service, a county-based system that staffs two or three ambulances daily. Our department previously had a class 6 ISO rating, but, after an evaluation 3 years ago, we obtained a class 4 rating.<sup>3</sup>

### The Benefits

Does the public safety concept work? Sikeston's experience shows that it does. Fire departments all over the country provide two services: medical assistance and fire protection. In fact, most will spend 80 percent of their time answering medical calls. Prior to September 11, 2001, Sikeston worked together as police and fire. At that time, police officers wore level-A hazardous materials suits, and the Special Operations Group trained in suits with self-contained breathing apparatus and tactical weapons. Sikeston recently was evaluated as part of the U.S. Department of Homeland Security (DHS) exercise, and evaluators were impressed that our Special Operations Group knew how to use hazardous material readers and monitoring equipment.

Directors with a background in both divisions better understand how to meet the needs of each. We evaluated how we operate as a department and made several adjustments that appear to work well. For example, officers can rotate at random; they must have the same level of training or qualification. This concept has decreased some morale issues that occurred in the past with forced rotation. Most important, the mayor, city manager

and council members, and citizens support the department. Approximately 2 years ago, Sikeston passed a tax to fund raises, increase staffing, and add equipment to the department. Our mayor stated that he wanted us to be both the best paid and equipped department in the state, and he has kept that promise. Departments must have the support of these individuals; if any of these elements falters, the concept will fail.

Regionalization has played a big part in Sikeston's recent efforts. We have partnered with regional police and fire agencies and established a homeland security response team and a bomb squad, helping everyone involved become more adept at working together. Sikeston also effectively

works with all federal agencies; because of our rural setting, we depend on their support and backing for regional funding. For example, the Southeast Missouri Regional Bomb Squad formed after an offender in a bank robbery threatened the use of explosives and authorities found such a device on him. After this event, Sikeston began a grant process to acquire a regional unit of four local police departments that would assign

personnel to the team. They received support for the project from the Missouri State Highway Patrol; the Cape Girardeau office of the Bureau of Alcohol, Tobacco, Firearms, and Explosives; and the St. Louis FBI office. The team was operational within 18 months. So far, it has responded to twice as many calls as anticipated. For such rural areas as Sikeston, regionalization is the only answer to many special service requests. Before these efforts, Sikeston residents sometimes waited up to 6 hours for assistance. Now, help arrives within a reasonable response time.

Since the inception of the DHS National Incident Management System (NIMS) and Incident

“  
**Directors with a background in both divisions better understand how to meet the needs of each.**  
”



---

Command System (ICS), the Sikeston Department of Public Safety has been operational under them, increasing the manageability of our command structure because we can assign one person who has a comprehensive understanding of both disciplines (police and fire) as “operations.” We also can determine various needs from both perspectives, giving us a qualified overview of the situation. During major events, we can place a large number of highly qualified personnel in the area who can provide feedback from both professions.

The cost for starting a public safety department may prove daunting to many agencies. All officers must have the basic equipment to perform their jobs, and they must receive regular training to enhance their proficiency. Sikeston researched the cost of separating the services and found that it would cost approximately an additional million dollars to split and maintain current levels of service. Employees are paid more than any other single-source agency in our area, and they receive some of the best training available.

For Sikeston, the benefits outweigh the risks; cities must be committed for this challenge. Many people like to make changes during their careers, or, perhaps, they just get bored in their positions. With public safety, many opportunities exist within one agency. Personnel trained in public safety are extremely marketable. When employees leave our department, they often join state or federal agencies due to their level of training and professionalism.

Leaders should expose their personnel to the other disciplines they will work with on a regional basis. For example, it is important for employees to know why the fire department does what it does, as well as the police. It might be time for a “Fire 101” class in the police academy and a “Police

101” in the fire academy. We must continue to bridge these gaps as a nation to be better prepared when the next major event happens, strengthening us for day-to-day events and providing more political clout to make our nation safer.

### Conclusion

The Sikeston, Missouri, Department of Public Safety discovered the benefits of combining their local fire and police agencies. Members receive cross training in both disciplines and continuously enhance their skills. The success of this type of department depends heavily on community support. All local, state, and federal agencies face unique challenges in today’s world, and many areas may need to integrate resources to increase their levels of service. A public safety department that provides fire and police protection as their main responsibilities can result in numerous benefits. Sikeston’s experience is

just one example of how agencies can take another step in upholding their oath of protecting their community and the citizens they serve. ♦

“

**Employees are paid more than any other single-source agency in our area....**

”

### Endnotes

<sup>1</sup> The southeasternmost part of the state of Missouri is called the “Bootheel” because of the shape of its boundaries. It is composed of the counties of Dunklin, New Madrid, and Pemiscot, but the term sometimes is broadly used to refer to the entire southeastern corner of the state.

<sup>2</sup> Quint means five and refers to a truck with a pump, water tank, hose, ground ladders, and an aerial ladder. Firefighters using a quint have the tools and equipment to do the jobs normally done from a pumper or a ladder truck. For more information, visit the National Fire Protection Association at <http://www.nfpa.org>.

<sup>3</sup> For information regarding these ratings, visit <http://www.iso.com>.

---

*Chief Juden heads the Sikeston, Missouri, Department of Public Safety.*

---



## ***Erasing the Past Tattoo-Removal Programs for Former Gang Members***

By BAKIR POLJAC, M.S., and TOD BURKE, Ph.D.

© Tim Frazier

A doctor carefully guides a pulsing laser across the skin of a 26-year-old former gang member who gasps and twists in pain, clenching his jaw. The individual has not been a victim of a stabbing or shooting. Rather, he wanted to undergo the excruciating procedure to burn off two gang-related tattoos he has had for a decade. For him and many others, removing these symbols of their past represents a vital step in the long, dangerous process of gang disassociation. Unfortunately, an inability to pay for this expensive procedure serves

as a major obstacle for many former gang members pursuing a new lifestyle.

Today, these individuals no longer must struggle on their own. Across the United States, as public officials try to find innovative ways to address gang problems in their communities, tattoo-removal programs have become increasingly popular. Now, if they qualify, former gang members trying to remake themselves and start new lives can have their tattoos, which connect them to their criminal past, removed free of charge. Thus, they receive a second

chance to become productive citizens.

### **GANGS**

Gangs have been entrenched in American society since the early 1800s, beginning with the Forty Thieves in New York City.<sup>1</sup> Today, approximately 760,000 gang members exist nationwide, not including those in prison, motorcycle gangs, or hate/ideology groups.<sup>2</sup>

Law enforcement agencies have struggled to maintain accurate statistics on gangs and their illegal activities due, in part, to differing opinions



*Mr. Poljac is a graduate of the criminal justice program at Radford University in Radford, Virginia.*



*Dr. Burke, a former police officer, is a professor of criminal justice at Radford University in Radford, Virginia.*

as to what constitutes a gang. Although no uniform definition exists, criminal justice academics and practitioners agree that a gang engages in some form of crime; otherwise, the group only fits the description of, perhaps, a deviant organization.<sup>3</sup> For the purpose of this article, the authors define a gang as “a group, informal or formal in nature, whose members recurrently commit crimes...known openly to the members, often conferring status or profit upon those...who commit the crime.”<sup>4</sup>

### **Benefits to Joining**

One expert considers it inaccurate to attribute all members’ reasons for involvement in a gang to any specific motive, such as the lack of a father figure, intimidation, or the hunger for amusement.<sup>5</sup> Simply stated, people join for various reasons.

For instance, individuals most often cite the opportunity

to earn money as the motive.<sup>6</sup> Other attractions include excitement, entertainment, and opportunities to socialize with others. Some people join a particular organization to follow in a family member’s footsteps. Friends and neighbors also may recruit an individual. Further, many members come from broken homes and, consequently, joined a gang for protection, status, respect, and a sense of belonging.

### **Reasons for Leaving**

As many members become older and mature, they realize that their future within a gang offers dim prospects. Some decide to leave after experiencing violence directly (e.g., shooting, beating, or stabbing) or indirectly (e.g., seeing such acts happen to friends). According to one former gang member, “Everybody has to grow up at some point...everybody I knew is either locked up or dead. Not

one of them is gangbanging.... It was a waste of my life.”<sup>7</sup> Additionally, individuals may decide to separate themselves from an organization because they get married, start a family, or find a job. Gang members willing to transform their lifestyle face many obstacles and risks, which can include murder as retribution for leaving the organization.

## **TATTOOS**

### **Uses by Members**

Upon becoming affiliated with gangs, individuals usually obtain tattoos, which display the name or symbols of the particular group, often in Old English script. Researchers know little about the exact purposes tattoos serve within a given organization, including if the gang requires them for membership or advancement. Regardless, these strong symbols represent commitment and allegiance. Once obtained, they serve as a sign of a lifelong bond that is difficult to break. Tattoos distinguish between rivals and allies and help individuals in large organizations recognize fellow members. They also intimidate others and provide advertisement for gang membership.

### **Help for Law Enforcement**

Because tattoos indicate relationships between individuals and organizations, they provide important information to law enforcement personnel,

---

enabling agencies to develop effective strategies, policies, and programs aimed at counter-ing gang-related activity. Not surprisingly, police across the country now pay greater at-tention to them. It has become common procedure for law enforcement and correctional officers to take photographs of a suspected member's tattoos, add them to the individual's personal record, and share them with other agencies.

One law enforcement expert considers tattoos the most pervasive and reliable of all indicators used to confirm gang affiliation.<sup>8</sup> In addition to their relative permanence, tattoos can provide valuable informa-tion about the person's personal history and criminal activity. A careful examination may reveal the wearer's rank within an organization, criminal expertise, and, occasionally, the number of murders the individual has com-mitted.<sup>9</sup> For example, a teardrop under an eye can indicate that the person has spent time in prison, killed someone, or lost a family or fellow gang member. Sometimes, only the wearer will know the exact meaning of the tattoo.

### **Concealment of Tattoos**

The increased focus on tattoos by police agencies has caused many gangs to reconsid-er their customs. Senior mem-bers across the country strongly

encourage younger ones not to receive tattoos because doing so will serve only to help law enforcement officers identify them as gang affiliates. Further, some members now conceal their tattoos with black ink to avoid identification.

“

***Upon becoming affiliated with gangs, individuals usually obtain tattoos....***

”

### **REMOVAL PROGRAMS**

Even when people success-fully break ties to a gang, their body art serves as a constant connection to their criminal past. The attached stigma cre-ates problems in all areas of life, especially when they try to find legitimate, meaningful work. In the past, those desperate to re-move their gang tattoos resorted to many painful and dangerous methods that included the use of belt sanders, knives, and acid.

Today, members choosing to leave an organization may seek assistance from tattoo-removal programs, which e-merged in the early 1990s and exist primarily in cities with high rates of gang membership. Programs consist of those privately run, such as the Agape

Light Tattoo Removal Program in Los Angeles, California, operated by a doctor and his local church, and others, such as the Skindeep Tattoo Removal Program in Fairfax County, Virginia, sponsored in part by local governments.<sup>10</sup> Usually, former gang members can have an unlimited number of tattoos removed, which can cost thou-sands of taxpayers' dollars. In exchange, participants perform community service.

To qualify for treatment, individuals must meet certain requirements. Although no uni-form admission standard exists, an applicant usually must reside within the city or county where the program operates, cease involvement with the gang, and undergo counseling (usually provided).

For example, the Clean Slate Program, based in San Jose, California, accepts gang-free participants between the ages of 14 and 25 and requires them to complete 40 hours of community service.<sup>11</sup> The program will remove tattoos visible in normal street clothing (e.g., on hands, wrists, neck, or face). Participants must have a job, attend school, or participate in a job-readiness or vocational program. Additionally, they have to remain committed for 1 year, attending biweekly group meetings for the first 6 months and a monthly meeting for the remaining time.



---

The Skindeep Tattoo Removal Program has slightly different requirements.<sup>12</sup> To qualify, applicants must be 22 years of age or younger and have an adult sponsor, such as a social worker, teacher, or police or probation officer. Participants must remain gang free in both lifestyle and associations and not use alcohol or other drugs. Similar to the rules adhered to by participants in San Jose, individuals must take part in educational programs, complete 40 hours of community service, and have or actively seek a job.

Unlike the previously described programs, the Salt Lake Area Gang Project in Utah does not require applicants to have a job or be enrolled in school because of its recognition that visible gang insignia may prevent an individual from obtaining employment.<sup>13</sup> Further, the program is not age specific as older gang members more likely will leave their organizations.

Instead, to qualify for Salt Lake County's tattoo-removal program, the applicant cannot be arrested within 1 year of applying. Additionally, the person must be out of jail or prison and released from probation or parole for at least a year prior to entering the program. They also must be in good standing with the courts (e.g., no outstanding fines or warrants). Participants have to complete 20 hours of community service before qualifying for treatment

and must provide photos of the tattoos they want removed.

Regardless of the program, participants must have determination to succeed and willingness to invest time and energy. The removal process is not only painful but lengthy. Depending on the size, color, and deepness of the tattoo, multiple treatments may prove necessary. While each treatment lasts only minutes, removal takes, on average, approximately 1 year.



© Tim Frazier

### Removal Process

The removal process involves a laser that targets the tattoo pigment with pulses of highly concentrated light that break the ink into small particles later absorbed by the body. Usually, the treatments are spaced 5 to 6 weeks apart to provide the body enough time to absorb the loose carbon particles. With each treatment, the laser penetrates deeper into the skin, causing the tattoo to fade. Regardless of the number of treatments, a shadow of the

tattoo likely will remain. Many doctors caution that complete removal is not possible. Black pigments are easiest to remove; other colors, such as green or purple, selectively absorb the laser light and, therefore, are more difficult to eliminate.<sup>14</sup>

When the laser strikes the carbon polymers imbedded underneath the skin, they explode and sometimes burn the flesh.<sup>15</sup> The pain involved in the procedure has caused those who have completed the process to compare it with being splattered with hot grease or snapped with a rubber band. The side effects of laser removal are minor but may include hyperpigmentation—an abundance of color in the skin after the initial treatment and hypopigmentation—the lack of normal skin color in the treated area.<sup>16</sup> Additionally, a slight chance of infection and scarring exists.

### Funding

For this expensive process, private practitioners charge anywhere from \$150 to \$500 per treatment; the total cost of complete removal of a tattoo can range from several hundred to several thousand dollars.<sup>17</sup> Most former gang members could not afford it.

Usually, a collaboration of community service agencies, volunteers, hospital donations (e.g., staff, space, and equipment), and local and federal grants fund the tattoo removal

---

programs. Doctors volunteer their time to provide free removals. One physician said, "I work hard, you know, and giving up Sundays is a big deal. But, I never go back to work Monday tired. There is a bounce in my step, and it's because I've just done what I think is a wonderful thing."<sup>18</sup> Without the aid of volunteer physicians, many of these programs would not exist.

### Effectiveness of Programs

No systematic empirical research exists regarding recidivism after tattoo removal, and the authors did not find any formal assessments conducted by the programs concerning their impact on the lives of these former gang members. However, testimony from individuals who have completed the programs indicates that their lives have changed dramatically.

For example, one former gang member stated, "I came in as a thug and gangster looking for a job, and my tattoos would not allow me to get hired. They took them off...and [I] managed to get help for a lot of other things through the program. I am now a real estate broker and living life the way it should be."<sup>19</sup> Another former participant explained, "I was involved in a street gang, and I felt as if I was trapped in that lifestyle. When I heard of this program, I felt a big relief because I was, like...saved. I knew if I had my

tattoos removed I would have a better chance of a job of my choice and a future I can look forward to."<sup>20</sup>

### Reaction

#### *Support*

Proponents of the programs note that tattoo removal costs significantly less than imprisonment. One expert noted that "if we keep one of these kids out of prison for a year, we have saved the taxpayers between \$30,000 and \$50,000. That's one. We're keeping 30, 40, 100 kids out of prison."<sup>21</sup>

***“Even when people successfully break ties to a gang, their body art serves as a constant connection to their criminal past.”***

Also, supporters praise the chance that former gang members have at a new life. These programs enable former criminals to become productive members of society.

#### *Criticism*

Despite the promise they have shown, these programs have received criticism. Some people object to the use of tax money to help support the

programs, arguing that these funds should go to other, perhaps, more important issues. Additionally, many consider it unfair that law-abiding citizens who want tattoo removal must pay the entire bill themselves.

Critics also cite public safety issues. Removal of gang tattoos poses a serious threat to officers who no longer can rely on them to identify potential gang members. Although all programs require that participants cease affiliation with a gang, some individuals still may remain connected to an organization even after removal of their tattoos. Such continued involvement can be difficult to detect. Some participants might claim they have ended their affiliation with a gang but still engage in illegal activities. Others may cease their involvement in crime but maintain friendships with active members; some relationships may predate gang membership and prove difficult to terminate. Considering the attempts by gang members to hide their tattoos, it seems reasonable that some individuals might try to take advantage of these programs without having any true intentions of leaving their organizations.

### CONCLUSION

A common theme exists among those who commit themselves to tattoo-removal programs. Participants want to live a better life; look forward to the

future; remain gang and drug free; and become productive, law-abiding citizens. To this end, anecdotal evidence appears promising.

These programs provide gang members the opportunity to, in a sense, erase their past. In doing so, these individuals receive another chance for a successful life—one that, otherwise, they may find elusive. ♦

#### Endnotes

<sup>1</sup> Tim Delaney, *American Street Gangs* (Upper Saddle River, NJ: Prentice Hall, 2000).

<sup>2</sup> U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Highlights of the 2004 National Youth Gang Survey* (Washington, DC, 2006).

<sup>3</sup> George Knox, *An Introduction to Gangs* (Peotone, IL: New Chicago School Press, 2006).

<sup>4</sup> Ibid.

<sup>5</sup> Martin Janowski, *Islands in the Street: Gangs and American Urban Society* (Berkeley, CA: University of California Press, 1991).

<sup>6</sup> Ibid.

<sup>7</sup> David Cho, "A Chance for a Clean Start: Tattoo Removal Programs Used as a Tool to Fight Gangs"; retrieved from <http://www.washingtonpost.com/wp-dyn/articles/A11232-2005Feb9.html>.

<sup>8</sup> Bill Valentine, *Gangs and Their Tattoos: Identifying Gangbangers on the Street and in Prison* (Boulder, CO: Paladin Press, 2000).

<sup>9</sup> Ibid.

<sup>10</sup> Dan Webber, "United States: Church Helps People Remove Tattoos, Brings People to Jesus," retrieved from <http://news.adventist.org/data/2006/07/1156883628/index.html.en>; and <http://www.fairfaxcounty.gov/hd/tattoo/>.

<sup>11</sup> <http://www.sanjoseca.gov/prns/Youth%20programs/ysic.asp>

<sup>12</sup> <http://www.fairfaxcounty.gov/hd/tattoo/>

<sup>13</sup> <http://www.slsheiff.org/html/org/metrogang/tattoos.html>

<sup>14</sup> [http://www.neimancenter.com/cosmetic/tattoo\\_removal.htm](http://www.neimancenter.com/cosmetic/tattoo_removal.htm)

<sup>15</sup> Supra note 7.

<sup>16</sup> Supra note 14.

<sup>17</sup> Julia O'Malley, "Wiping Out Gang Tattoos Helps Inmates Erase the Past," retrieved from <http://www.adn.com/news/alaska/anchorage/story/8331669p-8227691c.html>; and Brenda Peyton, "Removing Tattoos, Changing Lives," retrieved from [http://www.insidebayarea.com/oaklandtribune/ci\\_4195256](http://www.insidebayarea.com/oaklandtribune/ci_4195256).

<sup>18</sup> Tracy Smith, "Getting Rid of Gang Tattoos"; retrieved from <http://www.cbsnews.com/stories/2002/07/17/earlyshow/contributors/tracysmith/main515437.shtml>.

<sup>19</sup> <http://www.cleanslatela.org/testimonials.htm>

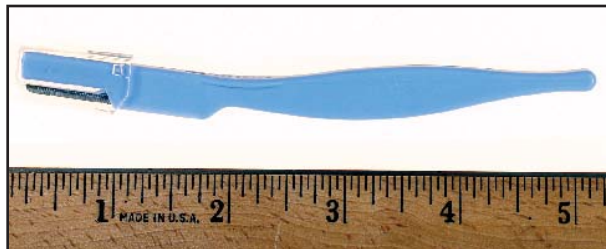
<sup>20</sup> Supra note 11.

<sup>21</sup> Supra note 18.

## Unusual Weapon

### Eyebrow Razor

Law enforcement officers should be aware that offenders may attempt to use this eyebrow razor as an unusual weapon. The item has a plastic handle with a metal blade. It may be able to pass through a magnetometer.



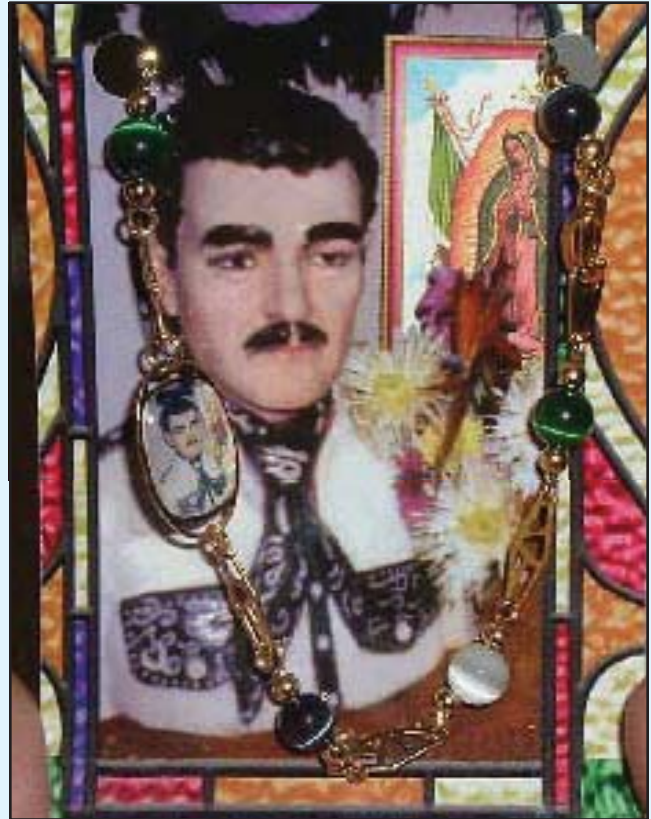


### Jesus Malverde's Significance to Mexican Drug Traffickers

By Robert J. Botsch, M.S.

*Lord Malverde, give your voluntary help to my people in the name of God. Defend me from justice and the jails of those powerful ones. Listen to my prayer and fill my heart with happiness. For you shall make me fortunate.*

*This prayer is representative of the spiritual guidance sought by drug trafficking organizations.*



In June 2003, an officer with the Utah Highway Patrol stopped a vehicle for having illegally tinted windows. Upon making contact with the driver, the officer noticed the overwhelming odor of an air freshener coming from the interior of the vehicle. Then, he saw four air fresheners inside the passenger compartment and a small pendant hanging from one of the dashboard air vents. The officer immediately recognized the image on the pendant as that of the Mexican folk hero Jesus Malverde. He knew from previous training that many Mexican drug traffickers acknowledged Malverde as their patron saint. In addition, he had personally encountered items bearing Malverde's image in 6 or 7 of about 20 other successful drug-interdiction stops. Immediately suspicious, the officer requested and received consent to search the vehicle.

He located a hidden compartment in the dashboard containing three packages of methamphetamine, a 9-millimeter handgun with an extra magazine and ammunition, and the driver's identification.<sup>1</sup> The officer's recognition of the image on the pendant and his understanding of its importance constituted key factors in requesting consent to search the vehicle. He safely and successfully located the evidence, arrested the offender, and obtained a federal weapons-related drug-trafficking conviction.

#### The Legend

Jesus Malverde was a notorious Mexican bandit who stole from the rich to give to the poor.<sup>2</sup> He received fame and notoriety in the state of Sinoloa around the turn of the 20th century. During that period, from 1877 to 1911, Porfilio Diaz ruled



---

Mexico. Viewed as a modernizer who encouraged the growth of big business, Diaz was particularly interested in attracting foreign investors. His lack of concern for the millions of residents living in poverty caused major social problems and unrest that eventually led to the Mexican Revolution. Some people turned to crime as a means of survival.

Jesus Malverde became a folk hero to the region's poor and working class because he challenged the Mexican government's authority and refused to comply with its laws. According to the legend, Malverde rode through the hills near the city of Culiacan in Sinaloa wearing green clothing to blend into his environment, committing banditry, and distributing the proceeds from his crimes to the area's impoverished inhabitants. These so-called acts of kindness ultimately earned him such titles as Angel of the Poor or Generous Bandit. He continued his criminal pursuits until 1909 when Mexican law enforcement officials captured and executed him. Since his reported death, Malverde has earned the status of a Mexican folk hero, representing hope to Mexico's poor and underprivileged. A common belief remains that Malverde protects and provides assistance to the poor people of Mexico. Because of the limited accurate details about Malverde, historians never have been able to prove his existence. In fact, some believe that he never lived and that his legend, based on a compilation of several different people, has become a symbol of justice, similar to Robin Hood, for the working poor in Mexico.

### **The Link**

The illegal drug trade has been a profitable business for decades. It has funneled billions of dollars back to Mexico, and at least a portion of

the drug proceeds have reached the poor people willing to work for these criminal enterprises. Those living in poverty have worshiped the spirit of Jesus Malverde for years, frequently asking for protection and a variety of personal favors. Over time, some of his followers entered the illegal drug trade and began asking Malverde for protection before, during, and after their drug-trafficking activities. To reinforce their beliefs, the traffickers often carried various items depicting Malverde's image hoping this paraphernalia would protect them further. If they successfully completed their drug-trafficking objective, they thanked Malverde

for his guidance. If arrested, they continued to ask for his assistance throughout their court proceedings. This practice became so common that his legend flourished, and Malverde eventually was labeled the unofficial patron saint of drug traffickers.

### **The Lookout**

Malverde's influence does not stop at the Mexican border. Law enforcement officers throughout the United

States have encountered Malverde-related paraphernalia. They have located pendants, statues, cards, photos, tattoos, candles, aerosol sprays, and a host of other items with Malverde's image printed on them. In addition, officers have established links—documented in incident reports, affidavits, court proceedings, and training courses—between Malverde paraphernalia and drug-related criminal activity.

As the case at the beginning of this article illustrates, recognizing subtle indicators, such as drug-related religious paraphernalia, can give law enforcement personnel advanced warning of potential officer-safety issues and lead them to evidence that they otherwise may overlook. Two additional incidents highlight the significance that

“  
**Since his reported death, Malverde has earned the status of a Mexican folk hero, representing hope to Mexico's poor and underprivileged.**  
”

---

Malverde can pose to Mexican drug traffickers and the importance that officers should attach to any items they may find bearing his image.

In October 2002, an officer with the Nebraska State Patrol initiated a traffic stop. Upon making contact with the driver, the officer asked for and received permission to search the vehicle. He located 5 pounds of amphetamine concealed in a door panel

and a phone card with a small picture of Jesus Malverde attached to it. Both the driver and a passenger were arrested. Prior to trial, the defense counsel made a motion to exclude the picture of Jesus

Malverde as evidence. The trial judge ruled that the picture would be accepted into evidence and expert testimony would be allowed to establish that drug traffickers operating out of Sinoloa, Mexico, where the defendants were from, frequently carry Jesus Malverde paraphernalia.<sup>3</sup>

In January 2003, an officer with the Wyoming Highway Patrol initiated a traffic stop based on a registration violation. As the officer approached the vehicle, he noticed that it had a temporary registration plate not clearly visible in the rear window. As he made contact with the driver, the officer saw that both the driver and front seat passenger were wearing necklaces with a Jesus Malverde emblem on them. In addition, he observed a Jesus Malverde emblem hanging from the rearview mirror. Based on his training and experience, the officer recognized the image of



Malverde as being associated with drug trafficking. The officer questioned the driver and passenger separately and determined that their statements were inconsistent. He confronted the driver about the inconsistencies and the Malverde emblem on his necklace. The driver became evasive, and the officer requested consent to search the vehicle. The driver and passenger both agreed. The officer located a hidden compartment in the vehicle that contained 9 pounds of marijuana and 7 pounds of methamphetamine. The driver and passenger were subsequently arrested, prosecuted, and convicted of conspiracy to possess with the intent to distribute methamphetamine and marijuana.<sup>4</sup> The appeals court cited the presence of the Jesus Malverde paraphernalia and the officer's understanding of the link to drug trafficking as factors

in helping the officer establish reasonable suspicion in this case.

### Conclusion

Becoming familiar with the folklore paraphernalia exhibited by individuals affiliated with Mexican drug trafficking is critical to recognizing potential officer-safety issues and commonly over-

looked indicators of criminal activity. Law enforcement officers need to recognize Jesus Malverde and appreciate that paraphernalia containing his image could be an indicator of criminal activity or an imminent threat to their safety.

Of course, not every person possessing an item bearing Malverde's image should be considered a drug trafficker. But, officers must remain alert to the possible connection. Just as in any encounter with an unknown, seemingly cooperative individual, officers face potentially deadly circumstances.<sup>5</sup> ♦

## Endnotes

<sup>1</sup> *United States v. Ramon Robles*, U.S. Court of Appeals Tenth Circuit, No. 04-4201, D.C. No. 2:03-CR-00478-DKW (December 2, 2005).

<sup>2</sup> For additional information, access [http://seattlepi.nwsource.com/local/222817\\_polydrug04.html](http://seattlepi.nwsource.com/local/222817_polydrug04.html); <http://www.pacificnews.org/jinn/stories/3.25/971201-narcofashion.html>; <http://www.portland-mercury.com/portland/Content?oid=276901&category=34029>; <http://www.foxnews.com/story/0,2933,245960,00.html?sPage=fnc.world/americas>; [http://www.associatedcontent.com/article/36310/jesus\\_malverde\\_the\\_narco\\_saint.html](http://www.associatedcontent.com/article/36310/jesus_malverde_the_narco_saint.html); <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/business/place.html>; and <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/business/malverde.html>.

<sup>3</sup> *United States v. Jose Antonio Briseno and Jose Alonso Uribe Rodriguez*, U.S. Court of Appeals Tenth Circuit,

Nos. 03-8099, 04-8001, D.C. No. 03-CR-10-D (January 18, 2006).

<sup>4</sup> *United States v. Jose Elisco Zavala Rivas*, U.S. District Court for the District of Nebraska, 4:02CR3205, memorandum (October 21, 2003).

<sup>5</sup> For additional information, see Anthony J. Pinizzotto, Edward F. Davis, and Charles E. Miller III, "The Deadly Mix: Officers, Offenders, and the Circumstances That Bring Them Together," *FBI Law Enforcement Bulletin*, January 2007, 1-10; <http://www.fbi.gov/publications/leb/leb.htm>.

---

*Special Agent Botsch, formerly assigned to the El Paso office where he investigated Mexican drug-trafficking organizations, currently serves in the Law Enforcement Communication Unit at the FBI Academy.*

---

## Crime Data

### *Preliminary Statistics for Law Enforcement Officers Killed in 2007*

According to preliminary statistics released by the FBI, 57 law enforcement officers were feloniously killed in the line of duty during 2007. This tragic figure represents 9 more than in 2006. Geographically, 31 of the officers were killed in the South, 9 in the West, 9 in the Midwest, and 7 in the Northeast. One officer was slain in Puerto Rico. The 57 law enforcement officers were killed in 51 separate incidents, with 50 of these cleared by arrest or exceptional means.

By circumstances, 16 deaths occurred as a result of ambush situations. Another 16 officers died making arrests, 11 handling traffic pursuits and stops, 6 responding to disturbance calls, 3 investigating suspicious persons and circumstances, 3 in tactical situations, 1 conducting investigative activities, and 1 handling and transporting prisoners.

A breakdown of weapons used in these slayings revealed that firearms were employed to fatally wound 55 of the 57 officers: 38 with handguns, 9 with shotguns, and 8 with rifles. Two officers were killed with vehicles. At the time of their deaths, 35 officers were wearing body armor. Eleven fired their weapons, and 14 attempted to do so. Four officers had their weapons stolen, and 2 were killed with their own weapons.

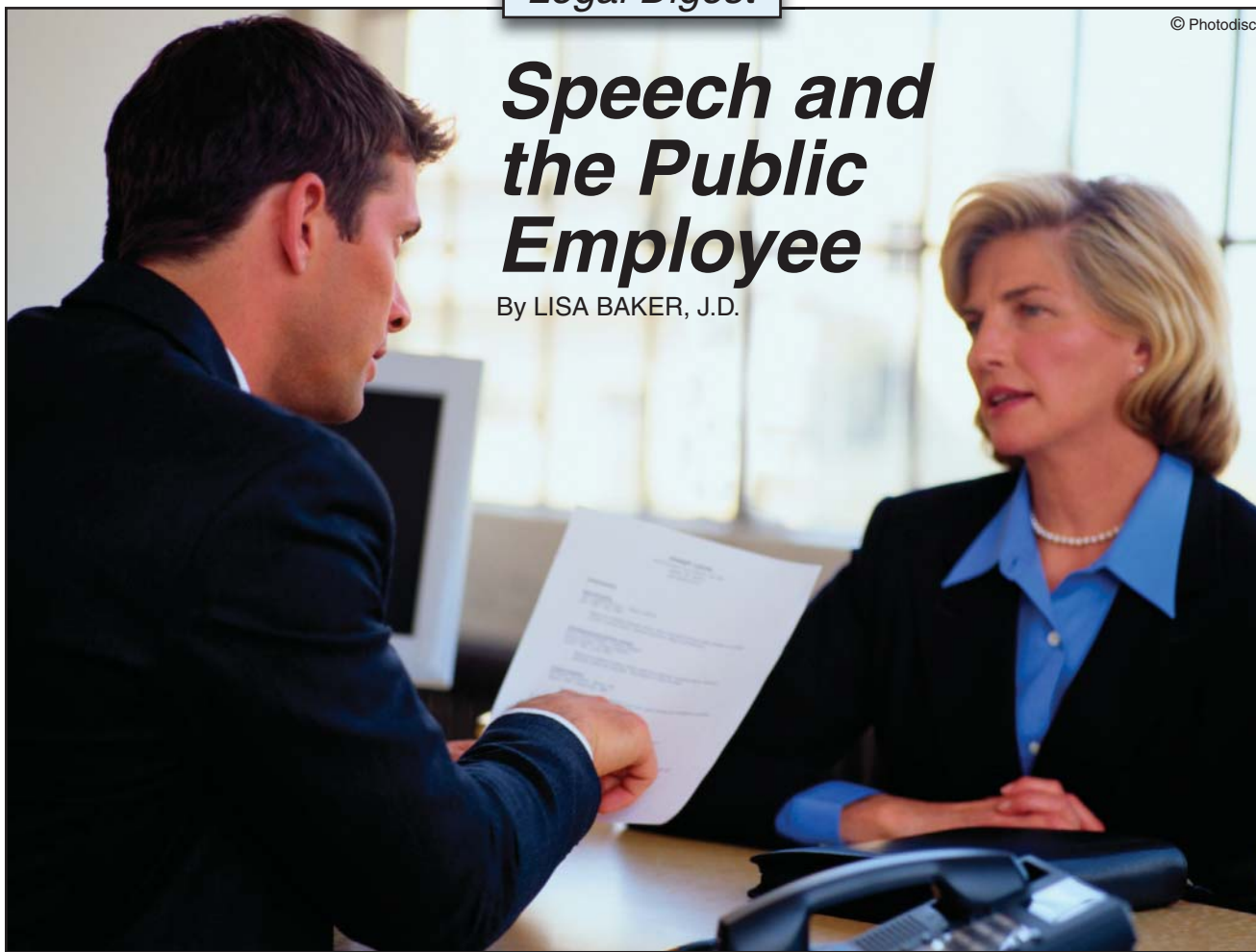
In addition to the 57 officers slain due to criminal action, 83 perished in accidents while performing their duties in 2007. This deadly toll is 17 higher than the previous year's total.

The FBI will release final statistics in the Uniform Crime Reporting Program's annual *Law Enforcement Officers Killed and Assaulted* report. This will be available on the Internet at <http://www.fbi.gov/ucr/ucr.htm#leoka>.



# Speech and the Public Employee

By LISA BAKER, J.D.



**T**he U.S. Supreme Court long has recognized that individuals do not relinquish their constitutional rights by entering into public service. However, the contours of these constitutional protections are interpreted in a manner to safeguard important governmental interests. Clearly, the government as employer has more authority than the government as sovereign. With regard to speech and expressive conduct engaged in by public employees, the proper formulation

under the First Amendment historically has been to apply a balancing test: balancing the interests of a public employee as a citizen in commenting on matters of public concern against the interests of the government as an employer.

The analytical framework began to take shape in the late 1960s. In case law covering this time period, the Supreme Court established a four-part inquiry to determine whether a public employee's First Amendment rights were violated. The

inquiry examines 1) whether the speech touched on a matter of public concern; 2) if so, whether the employee's interests in the speech outweigh the employer's interest in promoting efficient operations; 3) whether the speech played a substantial role in the adverse employment action; and 4) whether the government can show by a preponderance of the evidence that it would have taken the same employment action in the absence of the protected speech.<sup>1</sup> The first two



parts of this inquiry are questions of law for the judiciary to consider when evaluating whether the speech is protected under the First Amendment.<sup>2</sup> The final two considerations are questions of fact “designed to determine whether a retaliatory motive was the cause of the challenged employment decision.”<sup>3</sup>

The purpose of this article is to examine recent judicial activity interpreting and clarifying the first two prongs of the four-prong inquiry. The article discusses recent Supreme Court cases clarifying what constitutes public concern for purposes of assessing First Amendment protection, as well as the impact of speaking as an employee in the performance of official duties as opposed to speaking as a private citizen. In addition, the article explores the relative

interests that are assessed when determining the scope of First Amendment protection.

### **First Prong: Public Concern**

For speech by a government employee to possibly qualify for First Amendment protection, the Supreme Court in *Connick v. Myers*<sup>4</sup> set forth an initial threshold requirement that the speech must touch on a matter of public concern. Specific guidance on what amounted to public concern was not provided. However, the Supreme Court directed that the public concern analysis requires an examination of the content, form, and context of the speech, with content being the most important consideration.<sup>5</sup> *Connick* involved an assistant district attorney who, unhappy with a decision by management to transfer her, prepared a

questionnaire and circulated it within the office. The questionnaire solicited coworkers’ views on office morale, work assignments, the need for a grievance committee, confidence in management, and whether employees felt pressured to work on political campaigns. The Supreme Court concluded that only one question possibly touched on a matter of public concern. The remaining questions related to internal workplace grievances, and, thus, the questionnaire was not protected by the First Amendment.<sup>6</sup> The Supreme Court commented that this threshold inquiry is critical given “government offices could not function if every employment decision became a constitutional matter.”<sup>7</sup>

The Supreme Court later recognized that the boundaries of the public concern test were not well-defined and offered clarification in *City of San Diego v. Roe*,<sup>8</sup> in which a police officer with the San Diego Police Department (SDPD) was terminated after his employer discovered that he was selling homemade, sexually explicit videos and other police paraphernalia on an online Web site. The SDPD ordered the officer to “cease displaying, manufacturing, distributing or selling any sexually explicit materials or engaging in any similar behaviors, via the Internet, U.S. mail, commercial



*Special Agent Baker is chief of the Legal Instruction Unit at the FBI Academy.*

“  
**...the Supreme Court directed that the public concern analysis requires an examination of the content, form, and context of the speech....**

”

vendors or distributors, or any other medium available to the public.”<sup>9</sup> The officer removed some of the items for sale from the Web site but retained his seller profile, which included information about the videos he posted for sale as well as their prices. Based on his refusal to remove the items from the Web site, the SDPD terminated the officer. The discharged officer brought suit in federal court pursuant to Title 42, U.S. Code, Section 1983, arguing that his termination violated his rights to free speech and expression as guaranteed by the First and Fourteenth Amendments to the Constitution. The district court ruled in favor of the city, concluding that the officer’s conduct did not amount to speech on a matter of public concern. The officer appealed this ruling.<sup>10</sup>

The Ninth Circuit Court of Appeals agreed with the discharged officer, concluding that his conduct fell within the contours of speech on a matter of public concern and, given it was off duty and unrelated to employment, deserved First Amendment protection.<sup>11</sup> As stated by the court, “[the officer’s] expressive activities—as crude as they may appear—were directed at a ‘segment of the general public’ and did not have ‘any relevance to [his] employment.’”<sup>12</sup> Once it concluded that the officer’s expressive

activities touched on a matter of public concern, it remanded the case for further consideration under the *Pickering* balancing test, directing the lower court to weigh the interests of the department in restricting the expressive conduct at issue and the officer’s interests in engaging in the expressive activities.<sup>13</sup> The city of San Diego appealed the ruling on the issue of public concern to the U.S. Supreme Court.

“  
**...the Supreme Court has sought to narrow the type of speech and expressive conduct requiring further judicial scrutiny under the First Amendment.**  
”

The Supreme Court acknowledged that while “the boundaries of the public concern test are not well-defined,”<sup>14</sup> *Connick* directs the Court to consider the “content, form, and context of a given statement” when assessing whether speech touches on a matter of public concern.<sup>15</sup> The Court further elaborated that public concern involves “something of legitimate news interest; that is, a subject of general interest

and of value and concern to the public at the time of the publication.”<sup>16</sup> Applying these principles to the expressive conduct engaged in by the officer in *Roe*, the Court stated, “there is no difficulty in concluding that [the officer’s] expression does not qualify as a matter of public concern under any view of the public concern test.”<sup>17</sup>

Starting with *Connick* and extending through *Roe*, the Supreme Court has narrowed the type of speech and expressive conduct requiring further judicial scrutiny under the First Amendment.<sup>18</sup> This interpretation of the contours of the First Amendment continued when the Court addressed the distinction of speech made pursuant to official duties as opposed to speaking out as a citizen.

#### **Further Clarification of Public Concern: Statements Made Pursuant to Official Duties**

The Supreme Court recently clarified that speech on a matter of public concern does not include speech made pursuant to the employee’s official duties. Prior to 2006, courts took differing views regarding the extent to which speech that was related to the employees’ official duties could be protected under the First Amendment.<sup>19</sup> The Supreme Court provided clarification regarding this issue in the case of *Garcetti v. Ceballos*.<sup>20</sup> In *Garcetti*, Richard

---

Ceballos, a supervising deputy district attorney assigned as a calendar attorney, drafted a memorandum regarding a pending criminal case in which he expressed concern that there were inaccuracies in an affidavit used to obtain a search warrant in the case. These allegations were conveyed to Ceballos by a defense attorney. Ceballos also expressed his concerns to his supervisors and prepared a memorandum recommending dismissal of the criminal case. The District Attorney's Office proceeded with the case. A hearing occurred before a judge to address the matter of the search warrant during which Ceballos testified for the defense. The trial court judge rejected the motion to dismiss the warrant.

Subsequently, Ceballos claimed that he was retaliated against when he was reassigned to another office as a trial attorney and denied a promotion in violation of his right to speech under the First Amendment. The District Attorney's Office denied any violation of the Constitution as Ceballos' memorandum setting forth his concerns was written pursuant to his official duties. The district court judge agreed and dismissed his lawsuit. The case was appealed to the Ninth Circuit Court of Appeals, which held that Ceballos' written memorandum was clearly speech on a matter of public concern.<sup>21</sup>

On appeal, the Supreme Court rejected the Ninth Circuit's analysis and held

[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.<sup>22</sup>

In reaching this conclusion, the Supreme Court described the critical consideration as the

**“  
The Supreme Court recently clarified that speech on a matter of public concern does not include speech made pursuant to the employee's official duties.  
”**

fact that Ceballos' statements were made pursuant to his official duties and not that they were made within the context of his employment, rather than publically, nor that they concerned that subject matter of his employment. The Supreme Court stated, “Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as

supervising attorneys, investigating charges, and preparing filings.”<sup>23</sup> As stated by the Supreme Court

Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe on any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned.<sup>24</sup>

In post-*Garcetti* cases, courts have focused extensively on whether the employee was speaking pursuant to his official duties and have, in a majority of cases, concluded that the First Amendment does not offer protection for a large range of expressive activities related to one's employment. For example, in *Spiegla v. Hull*<sup>25</sup> a corrections officer alleged retaliation in violation of the First Amendment after she was reassigned following her reporting of suspicious conduct and a possible breach of prison security by other officers. Initially, and pre-*Garcetti*, the Court of Appeals for the Seventh Circuit held that her speech touched on a matter of public concern and remanded the case for trial.<sup>26</sup> A jury found in favor of the officer and awarded her several hundred thousand dollars. The defendants appealed. Following the appeal, *Garcetti* was

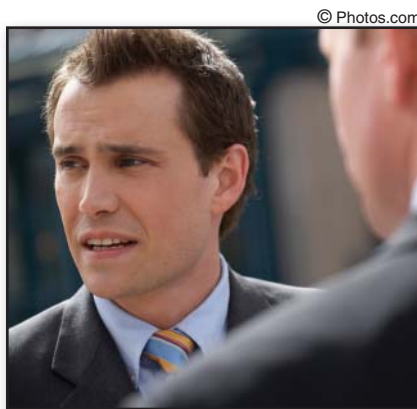
---

decided. On appeal, the court applied *Garcetti* and held that the officer was not speaking as a citizen “but as a correctional officer charged with the duty to ensure the prison’s safety. Accordingly, the First Amendment does not insulate her statements from employer discipline and the judgment in her favor must be vacated.”<sup>27</sup>

Other courts interpreting *Garcetti* also have used a broad net to bring speech within an employee’s duties. For example, in *Vose v. Klimment*,<sup>28</sup> Ronald Vose, a sergeant in charge of narcotics, resigned in the face of adverse action taken against him by his department when he voiced concerns to upper management about wrongdoing on the part of investigators assigned to a multiagency major case squad. He was concerned initially with how the activities of the major case squad might impact drug investigations under his supervision. Vose was told at some point to “get along” or transfer to the patrol unit.<sup>29</sup> He alleged that his subsequent resignation in the face of a demotion was in violation of his rights under the First Amendment. The court concluded that his speech fell within the scope of *Garcetti*, disagreeing with his argument that his role as a supervisor of a narcotics unit did not include investigating potential misconduct by officers in another unit

and, thus, he argued, he spoke out as a citizen. As stated by the court

Vose may have gone above and beyond his routine duties by investigating and reporting suspected misconduct in another police unit, but that does not mean that he spoke as a citizen and not as a public employee.<sup>30</sup>



Voses’ speech, while going beyond his routine or daily job duties, was not beyond his official duties as a sergeant in charge of the narcotics unit to ensure the proper operation of the narcotics program. The court concluded by stating, “[W]e find that Vose’s speech, albeit an honorable attempt to correct alleged wrongdoing, was not protected by the First Amendment.”<sup>31</sup>

In another case, a jury had found in favor of a plaintiff-police officer and awarded him compensatory and punitive damages after it concluded

that his employer, the Illinois State Police, retaliated against him in violation of his First Amendment rights. On appeal, the court overturned the jury verdict after it concluded that based on *Garcetti*, the officer’s speech was made pursuant to his official duties and not as a citizen.<sup>32</sup> In this case, allegations that individuals convicted of a murder may have been wrongly convicted while the actual offender remained at large were investigated. The officer behind this investigation expressed concern that the cover-up of this matter was politically motivated. He conveyed his concerns to his supervisors, who directed him to discontinue the murder investigation. The officer then complained to the Department of Internal Investigations, which, after reviewing the matter, decided to take no action. As a result of the fallout from the officer’s allegations, his agency decided to transfer him to another position, which he claimed was in retaliation for speaking out regarding the case and its handling. A jury found in his favor and awarded him over half a million dollars.<sup>33</sup> On appeal, the court agreed with the defendants that *Garcetti* was controlling and overturned the jury verdict. The court concluded that the officer was speaking pursuant to his official duties and not as a citizen and, thus, his speech fell outside



---

the protections of the First Amendment.

In contrast is the speech in *Freitag v. California Department of Corrections*.<sup>34</sup> In this case, a female corrections officer sued her employer after she wrote a letter to the director of the California Department of Corrections and Rehabilitation complaining of a hostile work environment created by inmate sexual conduct directed at female corrections officers and subsequent retaliation against her after she spoke out regarding this conduct. A jury found in her favor regarding the sexual harassment claim, but the case was remanded in light of the Supreme Court's decision in *Garcetti*.<sup>35</sup> On remand, the Ninth Circuit concluded that her speech did not owe itself to her official duties, even though the letter may have had some official consequences and the conduct she complained of occurred at her workplace.<sup>36</sup>

The impact of *Garcetti* has been to enable employers to retain control over speech that “owes its existence to a public employee’s professional responsibilities”<sup>37</sup> and to avoid “displacement of managerial discretion by judicial supervision.”<sup>38</sup> While rejecting the notion “that the First Amendment shields from discipline the expressions employees make pursuant to their official duties”<sup>39</sup> the Court in *Garcetti* was careful to note

the important role of legislative enactments in the form of whistleblower statutes or labor code provisions to offer protection for employees who wish to expose governmental inefficiency and misconduct.<sup>40</sup>

If the employee is deemed to be speaking as a citizen on matters of public concern—in other words, the threshold tests established under *Connick*, *Roe*, and *Garcetti* are met—the second prong of the Supreme Court’s test requires a balancing of interests to determine whether the First Amendment shields the speech from retaliatory action.

“  
**Relevant considerations often include whether the speech impairs close working relationships...**  
”

#### **Second Prong: Balancing of Interests**

Recognizing that the effectiveness of government entities may be seriously undermined by unrestrained declarations on the part of employees, the Supreme Court held in *Pickering v. Board of Education*,<sup>41</sup> that the First Amendment requires a balancing of the interests of the government in promoting

efficiency of operations with the interest of the employee as a citizen in commenting on matters of public concern. Relevant considerations often include whether the speech impairs close working relationships for which loyalty and confidentiality are important or whether it impedes the performance of duties or impairs discipline or harmony among coworkers.<sup>42</sup> When conducting this balancing test, the courts generally recognize the heightened interests of a law enforcement employer in maintaining discipline and harmony in the workplace and fostering a positive relationship with other agencies and the public.<sup>43</sup> Furthermore, in assessing the impact the speech may have on government operations, the employer does not have to wait to take action only upon a finding of actual harm but may act in the face of reasonable predictions of disruption.<sup>44</sup> As stated by the Supreme Court

[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.<sup>45</sup>

In *Locurto v. Giuliani*,<sup>46</sup> former New York City police officers and firefighters sued to get their jobs back after they were fired for participating in a Labor Day parade by riding on a float

degrading of African-Americans. Officials in New York City, including the police commissioner, learned of the participation of these city employees in the parade after extensive media coverage of the event described the racially insensitive nature of the float and the role of police officers and firefighters in its creation and operation during the parade.<sup>47</sup> Shortly after the parade, Mayor Giuliani stated, "I've spoken to Commissioners Safir and Von Essen and we all agree that any police officer, firefighter or other city employee involved in this disgusting display of racism should be removed from positions of responsibility immediately.... They will be fired."<sup>48</sup> The employees, including the officers, were subsequently terminated. The discharged employees sued, claiming their termination violated the First Amendment as they were engaged in off-duty, protected activity. The district court agreed with the officers, ruling that their expressive conduct touched on a matter of public concern given it was intended to send a message to the community about racial integration and the city failed to establish the potential disruption of their conduct to the agency's mission.<sup>49</sup> The court ordered the city to reinstate the officers and to provide back pay. The city appealed the district court's ruling.

On appeal, the Second Circuit Court of Appeals overturned the lower court's determination, holding that assuming the participation in the parade touched on a matter of public concern, the First Amendment offered no protection to the discharged employees as the interest of the city in restricting this type of expressive conduct outweighed the interests of the employees in its expression.<sup>50</sup> In reaching its decision, the court relied on *Pappas v. Giuliani*,<sup>51</sup> upholding the termination of a police officer after it was



discovered that he was anonymously disseminating racially offensive and bigoted materials from his home in response to solicitations from charitable organizations. The court in *Pappas* did not address the issue of whether the officer's activities touched on a matter of public concern, choosing instead to focus on the potential disruption to departmental operations

his activities presented.<sup>52</sup> The court concluded that the capacity for the officer's activities to severely damage the department was immense, stating

The effectiveness of a city's police department depends importantly on the respect and trust of the community and on the perception in the community that it enforces the law fairly, even-handedly, and without bias.... If the police department treats a segment of the population of any race, religion, gender, national origin, or sexual preference, etc., with contempt, so that the particular minority comes to regard the police as oppressor rather than protector, respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired. Members of the minority will be less likely to report crimes, to offer testimony as witnesses, and to rely on the police for their protection. When the police make arrests in that community, its members are likely to assume that the arrests are a product of bias, rather than well-founded, protective law enforcement. And the department's ability to recruit and train personnel from that community will be damaged.<sup>53</sup>

---

The court in *Locurto*, quoting the above passage, similarly concluded that the First Amendment did not require the city to subordinate its interests, concluding that “the defendant’s interest in maintaining a relationship of trust between the police and the fire departments and the communities they serve outweighed the plaintiffs’ expressive interests in this case.”<sup>54</sup>

### **Recap: Application of Public Concern and Balancing of Interests**

The case of *Nixon v. City of Houston*<sup>55</sup> illustrates the application of the initial threshold requirement of public concern and the *Garcetti* determination, as well as the balancing of interests that occurs once the initial public concern inquiry is satisfied in favor of the employee. In this case, Thomas Nixon, a former Houston police officer, sued the police department and the officials responsible for his suspension and termination, alleging he was retaliated against for making various statements during media interviews and publications he authored. For approximately 2 years, Nixon wrote columns for a local Houston periodical. In these articles, he identified himself as a police officer and often made caustic and derogatory comments about certain groups of citizens, including minorities, women,

and the homeless. Following an investigation into the matter, he received a 15-day suspension without pay.<sup>56</sup> As a result of another incident in 2006, Nixon was fired. This incident involved a highly publicized police pursuit in which Nixon proceeded to the scene, even though he was ordered not to. Once at the scene, Nixon spoke to the media, criticizing the police department’s decision

“  
**...courts generally recognize the heightened interests of a law enforcement employer in maintaining discipline and harmony in the workplace....**  
”

to disengage the pursuit and stating that he was “embarrassed to be a police officer.”<sup>57</sup> The next day, he continued his attack on the police department by calling into various radio talk shows and by giving a television interview. In response to his actions, the Houston Police Department terminated Nixon’s employment.

Nixon sued, alleging his suspension and termination were in retaliation for protected First Amendment activities. Summary judgment was entered

for the defendants, which Nixon appealed to the Fifth Circuit Court of Appeals. Applying *Garcetti*, the court stated that a “a formal job description is not dispositive...nor is speaking on the subject matter of one’s employment.”<sup>58</sup> However, “[a]ctivities undertaken in the course of performing one’s job are activities pursuant to official duties.”<sup>59</sup> Based on this description, the court concluded that Nixon’s statements to the media at the scene of the crash were made pursuant to his official duties and during the course of his employment. The court noted that Nixon spoke in uniform, while on duty, and made an effort to obtain approval to address the media. The court stated

The fact that Nixon’s statement was unauthorized by HPD and that speaking to the press was not part of his regular job duties is not dispositive. Nixon’s statement was made while performing his job, and the fact that Nixon performed his job incorrectly, in an unauthorized manner, or in contravention to the wishes of his superiors does not convert his statement at the accident scene into protected citizen speech.<sup>60</sup>

The court then considered the statements he made the next day to the media and concluded that while they may appear to

be more like citizen speech given they were made off duty, they actually were an extension of the statements he made while performing official duties and, thus, not protected.<sup>61</sup> The court went on to add that even if these statements were not controlled by *Garcetti*, they would nonetheless be outside the scope of First Amendment protection. Speaking out to the media in this manner severely undermined the substantial interests of the government in providing efficient services and as stated by the court

[I]t is entirely reasonable for HPD to predict that such insubordination and likely acts of future insubordination would harm HPD's ability to maintain discipline and order in the department, morale within the department, and close working relationships between Nixon, his fellow officers, and his supervisors.<sup>62</sup>

With respect to his authorship of the controversial articles, the court concluded that it did not have to resolve whether Nixon was commenting as a citizen or engaged in the performance of his official duties when he took part in these activities as the balancing of interests weighed heavily in favor of the HPD, and, thus, the articles were unprotected by the First Amendment.<sup>63</sup> The articles contained offensive and

insensitive comments regarding various segments of the population, and it was reasonable for the HPD to conclude that such comments would harm relationships within and outside the department. To hold otherwise would be to undermine HPD's mission, and "HPD must be able to prohibit such speech if it is to perform its function and maintain its professionalism."<sup>64</sup>

© Photos.com



## Conclusion

The precise contours of the First Amendment relative to speech by public servants is not easily described. However, recent judicial guidance allows for some generalizations. For speech to garner First Amendment protection and, thus, be protected from retaliation, the speech must be made as a citizen, as opposed to owing itself to the performance of official duties, and must address a matter of public concern. If this foundation is set, the First

Amendment will offer protection only if the interests of the employee in engaging in the expressive activity outweigh the substantial interests in maintaining efficiency of operations of a law enforcement employer. ♦

## Endnotes

<sup>1</sup> *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Thomsen v. Romeis*, 198 F.3d 1022 (7th Cir. 2000) (officer demonstrated that his speech was protected but failed to show that the adverse action taken against him was motivated by his speech).

<sup>2</sup> See *City Of San Diego v. Roe*, 125 S. Ct. 521 (2004) (per curiam); *Beckwith v. City of Daytona Beach Shores*, 58 F.3d 1554 (11th Cir. 1995).

<sup>3</sup> *Battle v. Board of Regents*, 468 F.3d 755 (11th Cir. 2006).

<sup>4</sup> 461 U.S. 138 (1983).

<sup>5</sup> *Id.* at 146-147.

<sup>6</sup> *Id.* at 141.

<sup>7</sup> *Connick* at 143.

<sup>8</sup> 125 S. Ct. 521 (2004).

<sup>9</sup> *Id.* at 523, quoting *Roe v. City of San Diego*, 356 F.3d 1108, 1111 (9th Cir. 2004).

<sup>10</sup> 356 F.3d 1108 (9th Cir. 2004).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1113, quoting *U.S. v. National Treasury Employees Union*, 513 U.S. 454, 465 (1995).

<sup>13</sup> *Id.* at 1122, citing *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968).

<sup>14</sup> 125 S. Ct. at 525.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* The Court referred to its prior decisions involving a common law action alleging an invasion of privacy for guidance on what constitutes a matter of public concern. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Time, Inc. v. Hill*, 385 U.S. 374 (1967).



<sup>17</sup> *Id.* at 526.

<sup>18</sup> See *Thaeter v. Palm Beach County Sheriff's Office*, 449 F.3d 1342 (11th Cir. 2006); *Tindle v. Caudell*, 56 F.3d 966 (8th Cir. 1995); *Murray v. Gardner*, 741 F.2d 434 (D.C. Cir. 1984) (FBI agent's criticism of furlough plan at an all-employee conference was "an example of the quintessential employee beef" that is not a matter of public concern); *Smith v. Fruinn*, 28 F.3d 646 (7th Cir. 1994); *Hasty v. Gladstone*, 247 F.3d 723 (8th Cir. 2001); *Hankard v. Town of Avon*, 126 F.3d 418 (2nd Cir. 1997).

<sup>19</sup> See *Garcetti v. Ceballos*, 361 F.3d 1168 (9th Cir. 2006); *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000); *Buazard v. Meridith*, 172 F.3d 546 (8th Cir. 1999); *Bradshaw v. Pittsburgh Independent School District*, 207 F.3d 814 (5th Cir. 2000); *Cromer v. Brown*, 88 F.3d 1315 (4th Cir. 1996).

<sup>20</sup> 126 S. Ct. 1951 (2006).

<sup>21</sup> 361 F.3d 1168 (9th Cir. 2006).

<sup>22</sup> *Id.* at 1960.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> 481 F.3d 961 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 441 (2007).

<sup>26</sup> *Spiegla v. Hull*, 371 F.3d 928 (7th Cir. 2004).

<sup>27</sup> 481 F.3d at 962.

<sup>28</sup> 506 F.3d 565 (7th Cir. 2007).

<sup>29</sup> *Id.* at 569.

<sup>30</sup> *Id.* at 570.

<sup>31</sup> *Id.* at 572.

<sup>32</sup> *Callahan v. Fermon*, 2008 WL 2096777, \_ F.3d \_ (7th Cir. 2008).

<sup>33</sup> *Id.* at \_. The jury awarded the officer \$210,000 in compensatory damages and \$276,700 in punitive damages with respect to one defendant and \$195,600 with respect to the other. The district court judge accepted the verdict but reduced the punitive damages to \$100,000 and \$50,000, respectively.

<sup>34</sup> *Slip op.* 2008 WL 1734181 (9th Cir. 2008). On remand from *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006).

<sup>35</sup> 468 F.3d 528 (9th Cir. 2006).

<sup>36</sup> 2008 WL 1734181 (9th Cir. 2008).

<sup>37</sup> *Garcetti* at 1960.

<sup>38</sup> *Garcetti* at 1961. See also *Haynes v. City of Circleville*, 474 F.3d 357 (6th Cir. 2007), *cert. denied* \_ S. Ct. \_, 2007 WL 2692992 (officer who administered canine program was speaking pursuant to his official duties when he sent a letter to the chief criticizing cutbacks in canine training program); *Mills v. City of Evansville*, 452 F.3d 646 (7th Cir. 2006) (sergeant disciplined for speaking out against cutback to crime prevention program was not speaking as a citizen but was speaking pursuant to her official duties); *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007), *cert. denied* \_ S. Ct. \_, 2008 WL 59370; *Andrew v. Clark*, 472 F.Supp.2d 659 (D.Md. 2007) (commander's dissemination of written memorandum to the media initially prepared for his agency describing his concerns regarding the handling of a barricade situation did not change the fact that he was speaking pursuant to his official duties).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1962. See also, *Sigsworth v. City of Aurora*, 487 F.3d 506, 511 (7th Cir. 2007) ("even employees who face retaliation for speech connected to a job duty may be entitled to protection under their state whistleblower statutes").

<sup>41</sup> *Pickering v. Board of Education*, 391 U.S. 563 (1968).

<sup>42</sup> *Rankin v. McPherson*, 483 U.S. 378 (1978).

<sup>43</sup> See generally *Weicherding v. Riegel*, 160 F.3d 1139 (7th Cir. 1998); *Tindle v. Caudell*, 56 F.3d 966, 971 (8th Cir. 1995) ("Because police departments function as paramilitary organizations charged with maintaining public safety and order, they are given more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer."); *Koch v. City of Hutchinson*, 847 F.2d 1436 (10th Cir. 1988); *Locurto v. Giuliani*, 447 F.3d 159 (2nd Cir. 2006); *Cromer v. Brown*, 88 F.3d 1315 (4th Cir. 1996).

<sup>44</sup> *Nixon v. City of Houston*, 511 F.3d 494, FN 8 (5th Cir. 2007) ("a government employer need not produce evidence of actual harm or disruption of governmental

operations"); *Weaver v. Chavez*, 458 F.3d 1096 (10th Cir. 2006); *Heil v. Santoro*, 147 F.3d 103 (2nd Cir. 1998).

<sup>45</sup> *Connick* at 152.

<sup>46</sup> 447 F.3d 159 (2nd Cir. 2006).

<sup>47</sup> *Id.* at 164-165.

<sup>48</sup> *Id.* at 165, quoting David W. Chen, "Officers and Firemen Wore Blackface on Float, Officials Say," *N.Y. Times*, Sept. 11, 1998.

<sup>49</sup> *Locurto v. Giuliani*, 269 F.Supp. 368 (S.D.N.Y. 2003).

<sup>50</sup> *Locurto v. Giuliani*, 447 F.3d 159 (2nd Cir. 2006).

<sup>51</sup> 290 F.3d 143 (2nd Cir. 2002).

<sup>52</sup> *Id.* at 146.

<sup>53</sup> *Id.* at 146-147.

<sup>54</sup> *Id.* at 178. See also *Eaton v. Harsha*, 505 F.Supp. 948 (D.Kan. 2007) (Police department's interest in maintaining efficient and effective operations outweighed the First Amendment interests of police officers in expressing their opinion that the city showed favoritism to African-Americans. The statements could reasonably lead to disharmony in the workplace and a lack of trust on the part of the community and questioned the ability of management to effectively lead).

<sup>55</sup> 511 F.3d 494 (5th Cir. 2007).

<sup>56</sup> *Id.* at 496.

<sup>57</sup> *Id.* at 497.

<sup>58</sup> *Id.* at 497-498, quoting *Williams v. Dallas Independent School District*, 480 F.3d 689, 692 (5th Cir. 2007).

<sup>59</sup> *Id.*, quoting *Williams* at 692.

<sup>60</sup> *Id.* at 498-499.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 499.

<sup>63</sup> *Id.* at 500.

<sup>64</sup> *Id.*

---

*Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.*

---

## The Bulletin Notes

Law enforcement officers are challenged daily in the performance of their duties; they face each challenge freely and unselfishly while answering the call to duty. In certain instances, their actions warrant special attention from their respective departments. The *Bulletin* also wants to recognize those situations that transcend the normal rigors of the law enforcement profession.



Officer Kaspar



Officer Kobler



Officer Schaller

Officer Lauren Kaspar of the Willowbrook, Illinois, Police Department received a call to assist a citizen in finding her dog in the vicinity of a large pond. Upon the officer's arrival, she was advised by two individuals that they heard a woman's voice calling for help. Officer Kaspar began searching for and calling out to the victim. She found the woman in the icy pond. Officer Kaspar called Of-

ficers Timothy Kobler and Robert Schaller for assistance. The officers threw a rope with a flotation device to the woman, but she could not hold on. Officer Kaspar then secured a rope around her body, and the three officers proceeded onto the ice. Officers Kobler and Schaller held onto the rope and Officer Kaspar's duty belt while she laid down on the ice, reached into the frigid water, and pulled the victim out. Officers Kobler and Schaller then helped Officer Kaspar and the woman to safety. Fire protection authorities transported the victim to a local hospital, where she was placed in intensive care. Her dog also was removed from the icy water and taken to safety.



Officer Davis

Early one morning, Officer Ted Davis of the Cuyahoga Falls, Ohio, Police Department responded to a house fire. He arrived before the fire department, and a passerby told him that people remained inside. Immediately, Officer Davis entered through the front door, advised the male occupant that his house was on fire, and encouraged him to leave the residence. The man advised Officer Davis that his wife and two children still were upstairs in their bedrooms. Immediately, Officer Davis helped the remaining family members, who were unaware of the fire, exit the home. As a result of Officer Davis' actions, everyone was safely evacuated, and no one was injured.

Nominations for the **Bulletin Notes** should be based on either the rescue of one or more citizens or arrest(s) made at unusual risk to an officer's safety. Submissions should include a short write-up (maximum of 250 words), a separate photograph of each nominee, and a letter from the department's ranking officer endorsing the nomination. Submissions should be sent to the Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Law Enforcement Communication Unit, Hall of Honor, Quantico, VA 22135.

Periodicals  
Postage and Fees Paid  
Federal Bureau of Investigation  
ISSN 0014-5688

\_\_\_\_\_

03/07